United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7537

To Be Argued By
A. SETH GREENWALD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANTONIA ECHEVARRIA, individually, and on behalf of all others similarly situated,

Plaintiff-Appellee,

-against-

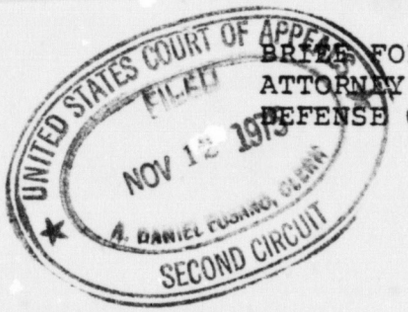
HUGH CAREY, individually, and as Governor of the State of New York; ARTHUR H. SCHWARTZ, individually and as Chairman of the State Board of Elections; REMO J. ACITO, individually, and as Vice Chairman of the State Board of Elections; DONALD RETTALIATA and WILLIAM H. McKEON, individually, and as Commissioners of the State Board of Elections,

Defendants-Appellants,

-and-

HERBERT FEURER, individually, and as President of the New York City Board of Elections; ALICE SACHS, ANTHONY SADOWSKI, STANLEY KOCHMAN, ELIZABETH CASSIDY, CHARLES AVARELLO and JAMES BASS, individually, and in their respective capacities as Members of the New York City Board of Elections,

Defendants.



BRIEF FOR STATE APPELLANTS, AND ATTORNEY GENERAL, PRO SE IN DEFENSE OF CONSTITUTIONALITY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

ANTONIA ECHEVARRIA, individually, and on behalf of all others similarly situated,

Plaintiff-Appellee,

-against-

HUGH CAREY, individually, and as Governor of the State of New York; ARTHUR H. SCHWARTZ, individually and as Chairman of the State Board of Elections; REMO J. ACITO, individually, and as Vice Chairman of the State Board of Elections; DONALD RETTALIATA and WILLIAM H. McKEON, individually, and as Commissioners of the State Board of Elections,

Defendants-Appellants,

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HERBERT FEURER, individually, and as President of the New York City Board of Elections; ALICE SACHS, ANTHONY SADOWSKI, STANLEY KOCHMAN, ELIZABETH CASSIDY, CHARLES AVARELLO and JAMES BASS, individually, and in their respective capacities as Members of the New York City Board of Elections,

Defendants.

----------X

BRIEF FOR STATE APPELLANTS, AND ATTORNEY GENERAL, PRO SE IN DEFENSE OF CONSTITUTIONALITY

Questions Presented

1. Is Election Law (N.Y.) § 186 a durational residency requirement as to voting in a primary?

2. Is Election Law (N.Y.) § 186 really involved in this appeal?

(a) Is Election Law § 187(6) involved and is it constitutional?

Statement

This is an appeal of a judgment of the Southern District of New York (Weinfeld, DJ.) granting plaintiff-appellee a declaratory judgment. This declared Election Law (N.Y.) §§ 186 and 187 unconstitutional as applied to a United States citizen from Puerto Rico, who arrived in New York after the preceding general election.

The Attorney General appeared herein primarily in his capacity to defend the constitutionality of a state statute. Executive Law (N.Y.) § 71.

Facts and Pleadings

Ms. Echevarria was formerly a resident of Puerto Rico, a self-governing Commonwealth within the United States. In January, 1975, she moved to New York State; specifically New York County. On March 4, 1975 she registered to vote there. Her enrollment, allegedly in the Democratic Party, was deferred pursuant to Election Law (N.Y.) § 186, as it occurred after the preceding general election. The effect was that she was not able to vote in the September 1975 primary.

She allegedly was told this at the time of registration and enrollment. On the other hand, she would have been eligible for a special enrollment pursuant to Election Law § 187(2)(c) -- ie. lack of residency at the preceding general election but for § 187(6), which limits (c) "to the same county the voter resided in at the preceding year."

Plaintiff only urged that § 186 was unconstitutional as applied to her.

Opinion Below

As the complaint did not seek injunctive relief, or same was withdrawn, the single district judge considered the plaintiff's motion for summary judgment. It was granted.

Assuming that Election Law § 186 was a durational residency requirement, Judge Weinfeld applied the "compelling state interest" test found in Dunn v. Blumstein, 405 U.S. 330 (1972)(19a) and declared § 186 unconstitutional. He found there was no substantial risk a voter from another state would be "raiding" a primary.* (20a-21a). Section 187 was also declared unconstitional (27a) although there is no rationale for the conclusion.

Class action relief was also granted.

*Note that in Ortner v. Board of Elections, infra, p. 10, a three-judge case, upheld the validity of § 186.

Statutes Involved

New York Election Law

"§ 186. Opening of enrollment box and completion of enrollment. All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year..." (In pertinent part)

"§ 187. Application for special enrollment, transfer or correction of enrollment. 1. At any time after January first and before the thirtieth day preceding the next fall primary, except during the thirty days preceding a spring primary, and except on the day of a primary, a voter may enroll with a party, transfer his enrollment after moving within a county, and under certain circumstances, correct his enrollment, as hereinafter in this section provided."

"2. A voter may enroll with a party if he did not enroll on the day of the annual enrollment (a) because he became of age after the preceding general election, or (b) because he was naturalized subsequent to ninety days prior to the preceding general election, or (c) because he did not have the necessary residential qualifications as provided by section one hundred fifty, to enable him to enroll in the preceding year, or (d) because of being or having been at all previous times for enrollment a member of the armed forces of the United States as defined in section three hundred three, or (e) because of being the spouse, child or parent of such member of the armed forces and being absent from

his or her county of residence at all previous times for enrollment by reason of accompanying or being with such member of the armed forces, or (f) because he was an inmate or patient of a veterans' bureau hospital located outside the state of New York at all previous times for enrollment, or the spouse, parents or child of such inmate or patient accompanying or being with such inmate or patient at such times, or (g) because he was incapacitated by illness during the previous enrollment period thereby preventing him from enrolling."

* * *

"6. Special enrollment under the classification set forth in clause (c) of subdivision two is hereby expressly limited to a voter otherwise qualified, who did not have the qualifications to vote at the previous general election and such special enrollment is restricted to the same county the voter resided in at the preceding year."

POINT I

ELECTION LAW § 186 IS CONSTITUTIONAL. IT IS NOT A DURATIONAL RESIDENCY REQUIREMENT. IT IS A LEGITIMATE REGULATION OF THE PARTY SYSTEM.

In light of the comprehensive decision in Rosario v. Rockefeller, 410 U.S. 752 (1973) there can be no doubt that Election Law § 186 is constitutional. The Supreme Court held that the State "is certainly justified in imposing some reasonable cutoff point for registration or party enrollment, which

citizens must meet in order to participate in the next election". Id. at 760. The prevention of party raiding, or preservation of the integrity of the electoral process is a "legitimate and valid state goal". Id. at 761. The decision and rationale clearly applies to a prospective enrolee, regardless of circumstances.

As decribed in Kusper v. Pontikes, 414 U.S. 51, 59-60 (1973), a decision which distinguished Rosario:

> "It is true, of course, that the Court found no constitutional infirmity in the New York delayed-enrollment statute under review in Rosario. That law required a voter to enroll in the party of his choice at least 30 days before a general election in order to be eligible to vote in the next party primary, ... It is also true that the Court recognized in Rosario that a State may have a legitimate interest in seeking to curtail raiding, since that practice may affect the integrity of the electoral process. 410 U.S., at 761." (ftn. omitted)

The validity of § 186 does not depend on whether the person it affects actually is a "party-raider". Or that the person who seeks late enrollment comes from out of state. There was no claim in Rosario that previously unaffiliated voters were actually "raiding" the Democratic Party. Conceptually the plaintiff herein, who was previously unaffiliated, presents the same situation. She sought to enroll at a time not allowed by state law.

Despite the above clear holding, the decision below relied on Rosario, id. at 759, ftn. 9* to take the opportunity to reach an opposite conclusion as to newly-arrived voters. Thus from the start of the opinion below (8a, 18a), it was assumed § 186 was a durational residence requirement. It takes no lengthy analysis to show that § 186 is not such and, as a consequence, Dunn v. Blumstein, supra, has no application. In Dunn, the recent arrived resident absolutely could not register to vote, although everyone else could, up to 30 days before an election or a primary. Undoubtedly Dunn involved classification based on length of residence. However, in New York, plaintiff, when she he came to New York, was in the same position as any other citizen who had failed to enroll before the preceding general election, regardless of length of residence. Thus, in New York, if § 186 applies, all citizens receive equal treatment as to the time party enrollment must be effected. Dunn v. Blumstein, supra, at 336 clearly described that "(d)urational residence requirements completely bar from voting all residents not meeting the fixed durational standards." (emphasis supplied). Obviously § 186 is not such a requirement. It does not bar all residents from voting and does not contain a fixed durational requirement.

*Ftn. 9 said that a claim that § 186 was a durational residency requirement, unconstitutional under Dunn v. Blumstein, 405 U.S. 330 (1972) could not be raised by petitioners who made no claim they were recently arrived residents.

The plaintiff argued for, and the District Court accorded, greater rights than the average elector subject to § 186. Simply because plaintiff had come to New York after the preceding general election she was possessed of greater rights. This is unequal protection of the laws. This never was the meaning of the Fourteenth Amendment to the United States Constitution. There simply is no classification in Election Law § 186 based on length of residence.

Contrary to the opinion below, the challenged requirement is a "delayed-enrollment" statute, Rosario v. Rockefeller, supra; Kusper v. Pontikes, supra, at 59; it is not a durational residence requirement, opinion below, (8a, 18a).

POINT II

THE OPINION BELOW SUBSTITUTED ITS JUDGMENT FOR THAT OF THE LEGISLATURE.

By finding that "(t)he possibility that voters in this group would be exploited to raid political parties absent section 186 is minimal (20a)," the District Court was substituting its judgment for that of the Legislature.

The Court's reasoning was based on the (1) 3 month durational residency requirement Election Law § 150 (later amended to reflect the 30-day requirement, Atkins v. Onondaga County Bd. of Elections, 30 N Y 2d 401 [1972]). (2) the assumption that new-arrived residents did not come to raid a party, and (3) the assumption that party organizers could not successfully organize such voters.

The above was obviously not the rationale of the statute. Election Law § 186 was designed to effectively eliminate any possibility of large-scale raiding, not minimize the risk. Firstly, 30 days residence has to do with administrative requirements, which we have never argued as the reason for § 186. Secondly, whatever the reason for moving, the newly-arrived resident is a group who now can raid, or be part of one. Thirdly, party organizers can build raids using this group, together with other enrollees.

As far as experience, "raids" are more frequent in our third parties, and in the smaller county organizations. See Rosario v. Rockefeller, 458 F. 2d 649, 652, ftn. 3. See specifically Matter of Zuckman v. Donahue, 191 Misc. 399, 79 N.Y.S. 2d 169

(Sup. Ct.), mod. 274 App. Div. 216, 80 N.Y.S. 2d 698, aff. 298 N.Y. 627, 81 N.E. 2d 371 (1948). Here the small American Labor Party in Albany County (approximately 1,000 enrollees) was apparently being "raided" by Democrats. If § 186 was not in effect, the "raid" would have been much larger with potential enrollees from groups such as recently arrived residents. As it was only properly enrolled persons could "raid" and this was controllable via other means, ie., Election Law § 332, a time-consuming process.

In this specific area, regulation of the electoral process, the State need not use the least drastic means necessary to achieve the legitimate goal. Cf. Shelton v. Tucker, 364 U.S. 479, 488 (1960). On the contrary, according to Rosario, the time limitation is justified, id. at 760. It "is not an arbitrary time limit unconnected to any important state goal", id. at 760.

As was said in Neale v. Hayduk, 35 N Y 2d 182, 187, 316 N.E. 2d 861, 359 N.Y.S. 2d 542 (1974), app. dism. ___ U.S. ___ and adhered to by the three-judge District Court in Ortner v. Board of Elections, (74 Civ. 3416, S.D.N.Y., September 9, 1974):

> "On the contrary, the regulatory device chosen need be satisfied only by a test of reasonableness so long as the overall limitation satisfies the compelling state interest."

and

> "Rosario has specifically upheld our time limitations on enrollment and we fail to understand why the Legislature may not distinguish between voters moving from county to county from those moving within a couty -- or the City of New York even though the city, as a unique political subdivision, happens to encompass several counties. This is a legitimate distinction drawn to achieve demonstrably reasonable ends."

What the opinion below failed to consider was that the previously unaffiliated voter, from within or without the State, constitutes a large group which can be organized to "raid" a party, especially as to the third parties. There is a legitimate end in preserving party integrity by closing enrollment 8 to 11 months before the primary.

In any event, N.Y. Election Law § 186, by deferring the effect of new party enrollments until after the next election, protects the integrity of political parties by preventing a takeover of a party in a particular locality by an outside group, through a sudden influx of new enrollees who have no sympathy with the long term aims and objectives of the party. See Alexander v. Todman, 337 F. 2d 962, 969 (3d Cir. 1964) cert. den. 380 U.S. 915 (1965). It also gives the party an opportunity to scrutinize new enrollees to determine whether they are in sympathy with the aims of the

party or whether the party enrollment is subject to cancellation pursuant to N.Y. Election Law § 332. In view of the constitutionally valid state interest in protecting party integrity, Rosario v. Rockefeller, supra, Alexander v. Todman, supra, N.Y. Election Law § 186 is a regulation of the electoral process within the power of the State beyond tenable challenge. Kramer v. Union Free School District, 395 U.S. 621, 625 (1969); Williams v. Rhodes, 393 U.S. 23, 29 (1968); Carrington v. Rash, 380 U.S. 89, 91 (1965); McDougall v. Green, 335 U.S. 281 (1948).

POINT III

ONLY ELECTION LAW § 187 IS INVOLVED AND IT IS CONSTITUTIONAL.

In presenting the claim that, as an newly-arrived out-of-stater, plaintiff was deprived of her constitutional rights, the question really revolves around Election Law § 187. This provides several exceptions to § 186. Echevarria would have been entitled to a special enrollment, valid for the September, 1974 primary, by § 187, subd. 2(c) but for the limitation of subd. 6 ("...special enrollment is restricted to the same county the voter resided in at the preceding year.").

Thus Echevarria, as did the petitioners in Neale, should have been held to be challenging § 187(6). The opinion below totally ignores § 187. However, as Neale notes, id. at 188:

> "We note that in Matter of Jordan v. Meisser, (29 N Y 2d 661, app. dismd. 405 U.S. 907) this court unanimously upheld the validity of subdivision 6 of section 187 over petitioner's argument that he was denied equal protection. He had moved to Nassau County from Georgia and filed a valid designating petition. He was kept off the ballot, however, because subdivision 6 forced him to observe the time delay provisions of section 186. We see no factual distinction in the instant case warranting our departure from this very recent position taken on the same statute."*

The action of the Supreme Court in dismissing the appeal for "want of substantial federal question" in Jordan, 405 U.S. 967 is a decision on the merits, binding on this Court. It is the substantive equivalent of affirmance. Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F. 2d 259, 262 (2nd Cir. 1967).

As we have noted, Ortner v. Board of Elections, supra, adopted Neale.

*Even the dissent in Neale, 35 N Y 2d at 192, accepted Jordan.

The instant case even lacks the Neale argument that the petitioner was continuing a preexisting political affiliation. The appellee Echevarria makes no claim she was a Democrat in Puerto Rico. We would have the Court take judicial notice that the political system in Puerto Rico is independent of our two recognized major parties. Echevarria was seeking an entirely new political affiliation in New York State.

It seems quite clear that the above definitive decisions, Jordan v. Meisser, Neale v. Hayduk, Ortner v. Board of Elections, supra, have all upheld Election Law § 187.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED.

Dated: New York, New York
November 5, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
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Attorney for State Defendants-
Appellees

SAMUEL A. HIRSHOWITZ
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Of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

SUSAN D. CHIECO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for State Defendants Appellants herein. On the 10th day of November , 1975 , she served the annexed upon the following named person :

RICHARD J. HILLER
Puerto Rican Legal Defense
and Education Fund, Inc.
Attorney for Plaintiff-Appellee
95 Madison Avenue
New York, New York

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Susan D. Chieco

Sworn to before me this
10th day of November , 1975

R. J. Hoenvale

Assistant Attorney General
of the State of New York